Supreme Court, U.S.
FILED

091213 APR 7- 2010

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT of the UNITED STATES

TIMOTHY CHARLES LAMB,

Petitioner,

v.

STATE BOARD OF LAW EXAMINERS,
STATE OF NORTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

For the Petitioner
Timothy C. Lamb
Representing Pro Se
P.O. Box 5562
Grand Forks, ND 58206-5562
(701) 330-1575
tclamb@earthlink.net

QUESTIONS PRESENTED FOR REVIEW

1) Whether the lower court's ruling violates the due process clause of the Fourteenth Amendment to the United States Constitution and conflicts with relevant United States Supreme Court decisions because it denies the Petitioner access to information or evidence under the state's public records during a formal fact-finding hearing that challenges the validity of a professional licensure examination before a state board?

2) Whether the state court's rule prohibiting access to public records regarding critical evidence in the development of the bar exam, which determines the professional licensure and employment of an applicant – including the non-disclosure of the rationale for the cut off score, training of essay exam scorers, and test security measures – is void for being vague and overboard since it offends the due process clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

There are two parties in this case. The Petitioner, Timothy C. Lamb (hereinafter Lamb), is an applicant for admission to the bar of North Dakota. The Respondent, the North Dakota State Board of Law Examiners (hereinafter the State Board), is the state licensing board for bar admissions in North Dakota.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

PARTIES TO THE PROCEEDING.....ii

CITATIONS OF THE OFFICIAL AND UNOFFICIAL RECORD..... 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE..... 1

STATEMENT OF THE CASE.....2

ARGUMENT FOR GRANTING CERTIORARI

I. The State Court's decision violates the due process clause of the Fourteenth Amendment to the United States Constitution and conflicts with relevant United States Supreme Court decisions because it denies the Petitioner access to information or evidence that is maintained under the state's public records during a formal fact-finding proceeding that impacts the Petitioner's professional licensure and employment.

5

II. The State Court's rule prohibiting access to public records maintained by a state board regarding critical evidence in the development of the bar exam,

which determines licensure and employment of an applicant – including the non-disclosure of the rationale for the cut score, training of essay exam scorers, test security measures, and other information regarding normally acceptable test setting standards – should be void for vagueness and overbreadth since it offends the due process clause of the Fourteenth Amendment to the United States Constitution. 15

CONCLUSION..... 21

APPENDIX

State Court Opinion

Lamb v. State Board of Law Examiners, State of North Dakota, 2010 ND 11, 777 N.W.2nd 343, N.D. Supreme Court No. 20090131, filed on January 12, 2010..... 1a

District Court Opinion

Lamb v. State Board of Law Examiners, State of North Dakota, District Court, Grand Forks County, N.D., Memorandum Decision and Order, Civil No. 08-C-1963, filed on December 31, 2008..... 18a

TABLE OF CITED AUTHORITIES

United States Constitutional Provisions

5th Amendment to the U.S. Constitution.....9, 10, 11

14th Amendment
to the U.S. Constitution.....2, 5, 11, 14, 18, 19, 20

Federal Court Cases

Allgeyer v. Louisiana, 165 U.S. 578 (1897).....10

Brewer v. Chauvin, 938 F.2d 860 (8th Cir. 1991)....11

Chicago v. Morales, 527 U.S. 41 (1999).....18, 20

Dent v. West Virginia, 129 U.S. 114 (1889).....10

Grayned v. City of Rockford,
408 U.S. 104 (1972).....17, 18, 20

Greene v. McElroy,
360 U.S. 474 (1959).....8, 9, 10, 11, 14

Hanna v. Larche, 363 U.S. 420 (1960).....6, 7, 8, 14

Hurtado v. California, 110 U.S. 516 (1884).....8

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980).....7, 14

NAACP v. Button, 371 U.S. 415 (1963).....17, 18, 20

Palmer v. City of Euclid, Ohio,
402 U.S. 544 (1971).....18, 20

Peters v. Hobby, 349 U.S. 331 (1955).....10

Powell v. Pennsylvania, 127 U.S. 678 (1888).....10

Roberts v. United States Jaycees,
468 U.S. 609 (1984).....18, 20

Schware v. Board of Bar Examiners,
353 U.S. 232 (1957).....10

Slochower v. Board of Education,
350 U.S. 551 (1956)..... 10

Smith v. Goguen, 415 U.S. 566 (1974).....17, 20

Truax v. Raich, 239 U.S. 33 (1915).....10

Zinermon v. Burch, 494 U.S. 113 (1990)..... 11

State Constitution, Statutes and Rules

N.D. Const., Art. XI, § 6..... 3

N.D.C.C. § 44-04-18..... 3

Rule 13, N.D. Admission to Practice
Rules..... 3, 4, 15, 18

Other Authorities

Comprehensive Guide to Bar Admission
Requirements, the National Conference
of Bar Examiners (years 1990-2009)..... 2, 16, 17

National Commission for Certifying Agencies..... 13

Setting Performance Standards: Concepts, Methods, and Perspectives, Gregory J. Cizek (Lawrence Erlbaum Associates, 2001)..... 12, 13

Standards for Educational and Psychological Testing, prepared by the Committee to Develop Standards for Educational and Psychological Testing of The American Educational Research Association, The American Psychological Association, and The National Council on Measurement in Education, updated in 1999..... 16, 19, 20

CITATIONS OF THE OFFICIAL AND UNOFFICIAL RECORD

The citations from the lower courts are listed as follows: Lamb v. State Board of Law Examiners, State of North Dakota, 2010 ND 11, 777 N.W.2d 343, N.D. Supreme Court No. 20090131, filed on January 12, 2010; and Lamb v. State Board of Law Examiners, State of North Dakota, District Court, Grand Forks County, N.D., Memorandum Decision and Order, Civil No. 08-C-1963, filed on December 31, 2008. See copies of opinions at Appendix.

STATEMENT OF JURISDICTION

Under the Rules of the Supreme Court of the United States, as adopted on January 12, 2010, this Court has jurisdiction of this matter pursuant to Rule 10(c), where a state court of last resort, the North Dakota Supreme Court, has decided an issue that is an important question of federal law that conflicts with the Constitution of the United States and relevant decisions by this Court. Id., Rule 10(c).

Pursuant to Rule 29.4(c), Rules of the Supreme Court of the United States, notification was given to the North Dakota Attorney General that a provision under the North Dakota Admission to Practice Rules promulgated by the North Dakota Supreme Court has been challenged under the U.S. Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

This petition for a writ of certiorari involves the Fourteenth Amendment to the United States

Constitution, which states in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." 14th Amendment, U.S. Constitution.

STATEMENT OF THE CASE

This case comes before the United States Supreme Court for a grant of a writ of certiorari from a decision by the North Dakota Supreme Court. The two parties are: Timothy C. Lamb ("Lamb"), the Petitioner, and the North Dakota State Board of Law Examiners ("State Board"), the Respondent. This case involved a request for public record information pursuant to a formal hearing before the State Board regarding Lamb's failed February 2008 bar examination. Appendix at 2a - 3a. Lamb made application to the bar of the state of North Dakota under its bar examination procedure. Id. The State Board made a negative recommendation to the North Dakota Supreme Court for Lamb's admission to the bar based upon his failing score. Id. After failing by a narrow margin of the cut off score, Lamb challenged the validity, reliability and fairness of the testing procedures and test development under generally accepted standards in professional licensure exams. Id. The pass rate for the February 2008 North Dakota bar exam was 47 percent. Comprehensive Guide to Bar Admission Requirements, the National Conference of Bar Examiners (2009). In effect, he attempted to discover information regarding the credibility of the

exam procedures to ensure that they were not arbitrary with regard to the cut off score, essay scoring methods, graders' training, grading techniques, security measures, etc. App. at 2a - 3a. Because of the State Board's denial of the information, Lamb sought a writ of mandamus to compel the State Board to release the information. Id. at 3a. The State Court upheld a state district court's decision to deny the writ of mandamus because Lamb had no "legal right" to the public records. Id. at 17a.

The State Board provided Lamb with some information with regard to its annual pass/fail statistical reports and copies of his essay exam test questions with model answers. Id. at 3a - 4a. However, the State Board failed to provide essential information regarding its cut score rationale, its training procedures for graders, test security measures, and other test development related material that Lamb specifically requested. Id. at 2a - 3a.

Although the State Constitution of North Dakota provides that "all records of public or governmental bodies, boards, [etc.], shall be public records, open and accessible for inspection[,]" [N.D. Const., Art. IX, § 6] the lower court ruled against Lamb's request for the public records because of a State Court rule, Rule 13, N.D. Admission to Practice Rules. App. at 4a and 13a - 14a. The State Court rule states that "all records maintained by the [State Board] ... shall be confidential except as provided by these rules." Id. and Rule 13, N.D. Admission to Practice Rules. A North Dakota state statute codifies the Open Records Law of the State Constitution (see N.D.C.C. § 44-04-18), but the State Court ruled that it has equal power to the state

legislature, so its rule does not conflict with any state provision. App. at 12a - 17a.

However, the State Court's decision did not address the U.S. Constitution in its opinion, which the Petitioner's Brief argued was relevant and applicable. The lower court opined that his U.S. Constitution argument was "unnecessary to our decision or without merit." Id. at 17a. In summary, the State Court determined that its court rule was not in conflict with the State Constitution because it also allows the State Court to make its own rules regarding admissions to the bar, that is, Rule 13, N.D. Admission to Practice Rules. Id. at 6a, 17a.

In pertinent part, the lower court held:

> "Under the constitutional authority to promulgate rules that govern the admission to practice law in North Dakota, this Court adopted the Admission to Practice Rules. In 1990, we adopted a rule specifically exempting board records from public disclosure. Admission to Practice R. 13, Comment. Admission to Practice R. 13(A) provides that '[a]ll records maintained by the Board regarding applications for admission to practice law, all examination materials, and all proceedings by the Board shall be confidential except as provided by these rules.'"

App. at 13a - 14a.

ARGUMENT FOR GRANTING CERTIORARI

This case seeks a grant of a writ of certiorari for compelling reasons. The facts in this case show that the Petitioner was denied access to public records that are essential to his assertion that the professional licensure examination he took in February 2008 was unreliable, invalid and unfair, and the resulting decision by the State Board to deny his application for admission to the bar was arbitrary. The State Court's deprivation of public record information in a formal proceeding does not comport with the fundamental fairness and justice that is guaranteed under the due process clause of the Fourteenth Amendment to the United States Constitution. 14th Amendment, U.S. Constitution. Nor does the lower court's decision square with relevant United States Supreme Court decisions. The State Court's unreasonable and unjustified precedent undermines the essence of the due process clause and our country's longstanding history of fair play in our system of jurisprudence.

I. The State Court's decision violates the due process clause of the Fourteenth Amendment to the United States Constitution and conflicts with relevant United States Supreme Court decisions because it denies the Petitioner access to information or evidence that is maintained under the state's public records during a formal fact-finding proceeding that impacts the Petitioner's professional

licensure and employment.

The requirements of due process depend on the nature of the proceeding, nature of the due process right under review, and the possible detriment on the proceeding being conducted. Hannah v. Larche, 363 U.S. 420 (1960). Therein, the United States Supreme Court stated, in relevant part:

> "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account."

Hannah v. Larche, supra, at 442.

In the case before the Court, the nature of the right involved is the right to access public record information in a proceeding that affects the professional licensing and employment of the Petitioner. Releasing the information is not a burden on the State Board. Lamb is not seeking names, identities, scores, or actual testing material of the bar exam, which may truly be classified as "confidential" information. He is requesting information on how the test is developed under standard setting measures. The formal proceeding is the first and final step in the fact finding process to review any complaints with the bar exam. The next step in the process, as per the N.D. Admission to Practice Rules, is an appellate style appeal to the State Court. That is the same court that denied Lamb's appeal for a writ of mandamus to compel the information from the State Board. The factors in this case should satisfy the Hannah due process test.

Regarding due process, the Supreme Court decided in another case, Marshall v. Jerrico, Inc., 446 U.S. 238 (1980), that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process." Marshall v. Jerrico, Inc. at 242.

In this case, Lamb's right to due process was deprived because the State Court denied essential

information that is in the public domain and in the records of the State Board. His case involved a professional test to determine his admission to the bar in North Dakota. He was denied admission based on the results of his test. His score was very close to passing in an exam that had a very low pass rate of less than 50 percent, so he petitioned the State Board in a formal hearing process. The next step in the process is to request review before the lower court, the North Dakota Supreme Court. Thus, the review process is at a critical stage in fact finding or discovery. This review process is a requirement for licensure for employment. Under this process, no further fact finding can be made after the State Board proceeding. In effect, the lower court's ruling cuts off Lamb's effort to meet his burden of proof under the rational basis test, which is to prove the state acted arbitrarily and capriciously in its test licensure procedure. The ruling makes the state or any individual acting under color of the law, in effect, immune from any liability or accountability. The State Court's ruling is repugnant to the U.S. Constitution and this Court's long history of defending the Due Process Clause. Hurtado v. California, 110 U.S. 516 (1884), and its progeny.

This case before the Court is similar to the case of Greene v. McElroy, infra, where a federal governmental action by several security clearance boards was reviewed as judicial in nature. In Greene, the Court found that although there was not an investigation involved as was the circumstances in Hannah, supra, the boards were determining whether to issue Greene a security clearance, which in effect, was a license to do his job, and had a significant impact on his employment. Greene v.

McElroy, 360 U.S. 474, 475 (1959). Greene was applying for a security clearance and the government boards denied it based on confidential information that he was not allowed to see. Greene v. McElroy, at 474. The case involved the "validity" of the security clearance process. Id. at 475.

In Greene, the Court held: "The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination." Id. at 493. Thus, the Court avoided confronting the issue of due process as it relates to liberty and property under the Fifth Amendment of the Constitution as applied to the federal government. The Court stated, in pertinent part:

> "Petitioner contends that the action of the Department of Defense in barring him from access to classified information on the basis of statements of confidential informants made to investigators was not authorized by either Congress or the President and has denied him "liberty" and "property" without "due process of law" in contravention of the Fifth Amendment. The alleged property is petitioner's employment; the alleged liberty is petitioner's freedom to practice his chosen profession. Respondents admit,

> as they must, that the revocation of security clearance caused petitioner to lose his job with ERCO [Greene's employer] and has seriously affected, if not destroyed, his ability to obtain employment in the aeronautics field. Although the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment, Dent v. West Virginia, 129 U.S. 114; Schware v. Board of Bar Examiners, 353 U.S. 232; Peters v. Hobby, 349 U.S. 331, 352 (concurring opinion); cf. Slochower v. Board of Education, 350 U.S. 551; Truax v. Raich, 239 U.S. 33, 41; Allgeyer v. Louisiana, 165 U.S. 578, 589 - 590; Powell v. Pennsylvania, 127 U.S. 678, 684, respondents contend that the admitted interferences which have occurred are indirect by-products of necessary governmental action to protect the integrity of secret information and hence are not unreasonable and do not constitute deprivations within the meaning of the Amendment."

Greene at 492.

Finally, in Greene, the Court held, "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual,

and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." Greene at 496. The Court concluded that, "In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure. ... We decide only that ... the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." Id. at 508.

In the Greene case, the lower court's decision was reversed and remanded by the United States Supreme Court. Id. Other relevant cases conflict with the State Court's decision in this case, as well. See, e.g., Zinermon v. Burch, 494 U.S. 113, 115-126 (1990), holding, "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not it itself unconstitutional, what is unconstitutional is the deprivation of such an interest *without due process of law*;" and Brewer v. Chauvin, 938 F.2d 860, 864 (8th Cir. 1991), stating, "A plaintiff's due process rights are not violated because his property is taken from him, his rights are violated because he was denied a certain amount of process *before* his property was taken." (Emphasis added.)

In this case, Lamb's employment opportunities (a liberty and property protected right under the 5th and 14th Amendments to the U.S. Constitution, as defined in Greene, supra, at 492) have been severely affected by a State Board that has deprived him of public records in a proceeding

that does not comport with "our traditional ideas of fair procedure," but also, a proceeding that is judicial in nature and does not afford "the safeguards" inherent in due process. The evidence Lamb seeks is essential to his case. It is not "confidential" information, and should place no burden on the state to produce. He is asserting that he is competent to practice law, and that the bar exam may be flawed in testing what it takes to be minimally competent to practice law in North Dakota. Minimum competency is the generally acceptable standard for professional licensure exams.

Experts in the field agree that professional licensure exams involve high stakes and require "the use of empirical, criterion-related data for the establishment of cut scores." Setting Performance Standards: Concepts, Methods, and Perspectives, Gregory J. Cizek (Lawrence Erlbaum Associates, 2001), at 34. In addition, Cizek writes, "Misclassifications of those not minimally competent pose risks to the public health, safety, and welfare, making licensing decisions 'high stakes.' Because licensure prevents those not so authorized from engaging in the applicable profession or occupation, the stakes for the applicant are also very high." Id. at 427. In other words, test takers are stakeholders in the exam standard-setting process, and they have a right to know how the high stakes exam was developed, just as the public has a right to know.

In the final analysis, this expert authority found, "Setting a standard to be high enough to provide protection for the public, but not so high as to exclude competent applicants from practicing, is a difficult task with serious consequences. Given the consequences, ... it is in the best interest of a licensing authority or the certifying entity and the

public it serves to have as much evidence as possible available to support its standard-setting judgment." Id. at 442. Therefore, if the high stakes professional licensure exam does not meet generally acceptable standards, stakeholders have a legitimate complaint and a right to challenge the exam results.

Lamb's request for information from the State Board, in fact, should add credibility to its professional licensure exam if released. Transparency in testing procedures is at the heart of the credibility, validity and reliability of its results, according to national licensing boards accreditation agencies. See, e.g., the National Commission for Certifying Agencies (NCCA), and its generally accepted standards. Instead, the State Board has chosen to suppress the standard-setting information as "confidential." That decision triggers suspicion rather than confidence in the exam development and grading procedures. Lamb is not seeking any personal information of test takers, nor is his seeking insights into test questions or answers.

Therefore, the gravity of this due process violation is paramount. Petitioner's fact-finding ability has been cut short during a proceeding that is judicial in nature and has a significant impact on his license for employment opportunity. Denying access to public record information in this employment related licensing process is fundamentally unfair, unreasonable and unjustified.

Lamb's request for information or his discovery motion during the formal proceeding process should not be confused with seeking the State Court's judicial records. This proceeding is before a state board with the statutory authority in licensing attorneys by a testing procedure. The Petitioner is seeking to determine if the State Board

is abiding by generally acceptable standards in the test development field. If the State Board is not using acceptable standards in the test development and grading process, the test becomes questionable with respect to its validity, reliability and fairness. In effect, if it is not following acceptable standards, any decision based on potentially flawed test results could be deemed arbitrary and capricious, which would not withstand the rational basis test under the U.S. Constitution. 14th Amendment, U.S. Constitution. The State Board or individuals acting under color of law could also be held liable under civil rights and anti-trust federal laws.

Because of the lower court's ruling, which is based on the State Court's rule, Lamb's heavy burden of proof can never be met under these conditions. At best, under the State Court's ruling, one would have to assume that the state is not capable of making a misclassification or misjudgment in this high stakes decisionmaking. At worst, if the state had a malicious, vindictive or prejudicial intent, it could cover it up by denying access to critical public information; and thus the public's interest and welfare is not properly served. In effect, this insulates the government from any proof of allegations of malfeasance or misclassification. Consequently, the State Board can effectively continue to operate in an unaccountable manner by denying access to its public records. The bad law precedent in this case cannot be allowed to stand. It brings violence to the United States Constitution. The lower court's decision is repugnant to the decisions of the United States Supreme Court in Hanna, Marshall, and Greene, supra. The Petitioner's due process rights have been violated by the ruling of the State Court, and it must

be overturned to allow justice to prevail.

II. **The State Court's rule prohibiting access to public records maintained by a state board regarding critical evidence in the development of the bar exam, which determines licensure and employment of an applicant – including the non-disclosure of the rationale for the cut score, training of essay exam scorers, test security measures, and other information regarding normally acceptable test setting standards – should be void for vagueness and overbreadth since it offends the due process clause of the Fourteenth Amendment to the United States Constitution.**

The State Court's decision relied solely on its own rule, Rule 13, N.D. Admission to Practice Rules, which states in relevant part: "[a]ll records maintained by the Board regarding applications for admission to practice law, all examination materials, and all proceedings by the Board shall be confidential except as provided by these rules." Appendix at 13a - 14a. The records exempted from the rule include names and addresses of applicants, pre-legal colleges attended, law schools attended, names and addresses of persons who have passed the bar and met admission requirements, and statistical data as authorized by the State Court. Id. at 14a. In effect, the rule excludes access to public records regarding the cut score determination, graders training program, test security, and minutes of the State Board meetings. Even if personal

information and test material were redacted from the public records, they are still considered "confidential" or a government secret under this rule.

Considering the facts in this case, the effect of the State Court's rule means that minutes of the State Board's meetings are "confidential" or held in secret since they are not included in the exceptions. App. at 14a. Without disclosure of the minutes of the meetings, there is no way to verify what the State Board has placed on its agenda or what business the board proceedings have accomplished. This puts a severe damper on the Petitioner's ability to prove any assertions regarding whether the State Board has made any deliberations on the cut off score of the exam or other standard setting determinations. Over the past 20 years, the North Dakota bar exam has changed. For example, the cut score has been modified from 125, to 130, to 260; the exam format has changed to include an essay Multistate Performance Test part; and it has recently added seven subject matter areas to the Multistate Essay Examination, including constitutional law, contracts, criminal law and procedure, evidence, real property, and torts. Those are the same subject areas that are tested exclusively in the Multistate Bar Examination, a 200 question multiple choice exam. See Comprehensive Guide to Bar Admission Requirements, the National Conference of Bar Examiners (years 1990-2009). The point in this discussion is that the cut score should be reviewed and reassessed after any changes in the exam to ensure its validity, reliability and fairness. See, Standards, infra. More importantly, the minutes should reflect what deliberations have been conducted with regard to setting the cut score;

otherwise, without evidence of deliberation on this factor, it would be an arbitrary decision. A possible consequence to this hands-off approach maybe the extreme range of the pass rate of the bar exam in North Dakota, ranging from 47 percent passing in February 2008 (the exam Petitioner failed by a small margin), to a 91 percent pass rate in 2001. Comprehensive Guide, supra. The minutes of the State Board's meetings during this time would show what, if anything, was done about this issue relating to the cut score. However, the minutes are "confidential" under the State Court's rule. App. at 13a - 14a. Petitioner argues that the rule patently denies due process on its face or as applied under the circumstances in this case.

Under the law, a statute, regulation or rule can be found unconstitutional on its face or as it is applied if it violates the U.S. Constitution. The basic law concerning the vagueness and overbreadth of authority has been established by the Supreme Court. A statute is void for vagueness when its prohibition is so vague as to leave an individual without knowledge of the nature of the activity that is prohibited. NAACP v. Button, 371 U.S. 415 (1963). To pass constitutional muster, the provision must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited ... [and] provide explicit standards for those who apply [it]" to avoid arbitrary and discriminatory enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). Even a clear, precise ordinance or law may be "overbroad" if it prohibits constitutionally protected conduct. Grayned, at 114. Once a law is determined to be constitutional as written, it may still be challenged if it was applied in an unconstitutional manner. Smith v. Goguen, 415

U.S. 566, 576 (1974); Palmer v. City of Euclid, Ohio, 402 U.S. 544 (1971).

The issue here is whether Rule 13, North Dakota Admission to Practice Rules is void because it does not give adequate notice of the public records access policy, which is contrary to the state's open records law, to an applicant who appeals his bar exam results before the State Board, or whether the rule is void because it prohibits "constitutionally protected" conduct under the due process clause of the Fourteenth Amendment to the U.S. Constitution because it prohibits information that should not be considered "confidential" and denies access during a formal hearing.

The rule prohibits the Petitioner from accessing public record information that is essential to proving his case against the State Board's administration of a professional licensing examination, which violates his due process rights, so it must be void as being unconstitutionally overbroad. It violates due process on its face or by how the State Court applied it. The rule conflicts with the Supreme Court's decisions in NAACP v. Button, Grayner, Smith, and Palmer, supra. See also, Chicago v. Morales, 527 U.S. 41 (1999) (holding that a loitering ordinance was void under the vagueness doctrine because it failed to give adequate notice and encouraged arbitrary enforcement); cf. Roberts v. United States Jaycees, 468 U.S. 609 (1984) (finding that the Minnesota Human Rights Act was not vague or overbroad where the Act was found to be violated by a non-profit organization's bylaws for not allowing women members).

Although the cases involving the void for vagueness and overbreadth doctrine primarily concern First Amendment free speech or criminal

law issues, the case before the bar falls within the broad scope of the purpose of doctrine. Here, we have an issue affecting a protected liberty and a due process right under the Fourteenth Amendment to the U.S. Constitution, so the doctrine should apply. If, for example, the rule prohibited a party from challenging the State Court's decision in the federal court system under the United States Constitution, it would undoubtedly be found void by the Supreme Court. Thus, the vagueness and overbreadth doctrine should apply in this case where Petitioner's constitutional rights have been violated by the application of a State Court rule.

The Petitioner is not seeking personal information or test materials. Lamb is requesting psychometric related data to assess whether the State Board is following acceptable standards in the field. For example, evidence of the cut score determination should be well documented, as experts in the field would strongly agree upon. For example, the Standards, infra, provide, "When a specific cut score is used to select, classify, and certify test takers, the method and rationale for setting that cut score, including any technical analyses, should be presented in a manual or report. When cut scores are based primarily on professional judgment, the qualifications of the judges also should be documented." Id. at 43.

Psychometricians are experts in this field of test validity. Like auditors, they check to ensure examinations comply with generally accepted standards in the field, whether for professional licensure, for college entrance, or for employment. See, e.g., Standards for Educational and Psychological Testing, prepared by the Committee to Develop Standards for Educational and

Psychological Testing of The American Educational Research Association, The American Psychological Association, and The National Council on Measurement in Education, updated in 1999. "The Standards is a technical guide that can be used as the basis for evaluating testing practices." Id. at 2.

In sum, certified public accountants audit the accounting books of entities to ensure they comply with generally accepted accounting standards; likewise, psychometricians, in effect, audit the records of testing agencies to ensure that they are following generally acceptable standards in the testing field. For example, they would perform a review to ensure the licensing authority is: setting the cut score under appropriate standards, ensuring adequate training of scorers is conducted, implementing sound test security measures, monitoring to ensure proper maintenance of its records, checking that proper reports are provided to the public and test takers, etc. Id. Psychometricians ensure there is transparency in the testing procedure, which leads to credibility, validity and reliability of the exam, and which protects the interests of both the public and the test takers. The State Court's rule will not allow for an analysis of its test setting standards by a psychometrician expert. The rule is vague and overbroad because it offends the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Therefore, under the broad scope of this Court's decisions in NAACP v. Button, Grayner, Smith, Palmer, Chicago, and Roberts, supra, the rule in this case should be found to be void because it is vague and overbroad.

CONCLUSION

For the reasons stated above, the United States Supreme Court should grant Petitioner's writ of certiorari in this matter.

Dated in April 2010.

Respectfully submitted,

For the Petitioner
Timothy C. Lamb
Representing Pro Se
P.O. Box 5562
Grand Forks, ND 58206-5562
(701) 330-1575
tclamb@earthlink.net